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No. 92-876

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

ROBERT P. MACIARIELLO and ARNOLD ROWELL,

Petitioners,

vs.

CITY OF LANCASTER, CITY OF LANCASTER POLICE DEPARTMENT, W.B. SUMNER, CHIEF OF POLICE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, PAUL S. PASKOFF, LANCASTER CITY ADMINISTRATOR, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

STEPHEN T. SAVITZ
(Counsel of Record)
VANCE J. BETTIS
LINDA PEARCE EDWARDS
GIGNILLIAT, SAVITZ & BETTIS
Counsel for Respondents
1527 Blanding Street
Columbia, SC 29201
(803) 799-9311

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the actions of police officers in conducting a two-month secret and unauthorized investigation of a superior officer and their actions in failing to report for two months suspected evidence tampering by a superior officer constitute speech on a matter of public concern entitling them to First Amendment protection?

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 2

COUNTER STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT A SECRET AND UNAUTHORIZED INVESTIGATION OF A POLICE OFFICER BY SUBORDINATES IS NOT, IN AND OF ITSELF, SPEECH UNDER THE FIRST AMENDMENT 10

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IN *HUGHES v. WHITMER* 11

III. THE COURT OF APPEALS DID NOT MISAPPLY THE CAUSATION STANDARD SET FORTH IN *MOUNT HEALTHY CITY SCHOOL DISTRICT BD. OF EDUC. v. DOYLE* 12

TABLE OF CONTENTS

Page

IV. PETITIONERS DO NOT RESPOND TO THE HOLDING OF THE COURT OF APPEALS THAT RESPONDENTS' INTEREST IN MAINTAINING DISCIPLINE, INTEGRITY AND EFFICIENCY OUTWEIGHED PETITIONERS' INTEREST IN CONDUCTING AN UNAUTHORIZED AND SECRET INVESTIGATION, AND SUCH HOLDING IS AN INDEPENDENT BASIS FOR SUPPORTING THE FOURTH CIRCUIT'S DECISION 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Breuer v. Hart, 909 F.2d 1035 (7th Cir. 1990) 14, 15

Brown v. City of Trenton, 867 F.2d 318 (6th Cir. 1989) 15

Connick v. Myers, 461 U.S. 138 (1983) 15, 16

Daniels v. Quinn, 801 F.2d 687 (4th Cir. 1986) 13

Dennison v. County of Frederick, Va., 921 F.2d 50 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2828 (1991) 10

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 13

Guillory v. St. Landry Parish Police Jury, 802 F.2d 822 (5th Cir. 1986), *cert. denied*, 482 U.S. 916 (1986) 10

Huang v. Bd. of Governors of the Univ. of North Carolina, 902 F.2d 1134 (4th Cir. 1990) 13

Hughes v. Whitmer, 714 F.2d 1407 (1983), *cert. denied*, 465 U.S. 1023 (1984) 11, 15

Johnson v. Town of Elizabethtown, 800 F.2d 404 (4th Cir. 1986) 13

Joyner v. Lancaster, 815 F.2d 20 (4th Cir. 1987), *cert. denied*, 484 U.S. 830 (1987) 14, 15

Jurgensen v. Fairfax County, Va., 745 F.2d 868 (4th Cir. 1984) 13, 15

Kelly v. Johnson, 425 U.S. 238 (1976) 15

McMurphy v. Flushing, 802 F.2d 191 (6th Cir. 1986) 14

TABLE OF AUTHORITIES

Page

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 12, 13

Terrell v. University of Texas System Police, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) 10

STATUTES AND CONSTITUTIONAL PROVISIONS

42 U.S.C. § 1983 2

First Amendment to the United States Constitution 2, 8, 10, 15, 16

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents herein respectfully request that petitioners' request for a writ of certiorari to the Fourth Circuit Court of Appeals be denied.

OPINIONS BELOW

The opinion of the District Court of South Carolina (Petitioners' Appendix 4a-14a) is not officially reported.

The opinion of the Fourth Circuit Court of Appeals (Petitioners' Appendix 36a-57a) is reported at 973 F.2d 295 (4th Cir. 1992).

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on August 18, 1992. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1983 and the First Amendment to the Constitution of the United States. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

COUNTER STATEMENT OF THE CASE[1]

Statement of Facts

The City of Lancaster is a municipality of about 10,000 residents and employs a police force of approximately 35 sworn officers. Robert Maciariello and Daryl Rowell were employed as police officers. Maciariello was hired in 1978 and Rowell in 1981. Both received several promotions and, at the time they resigned in 1987, Maciariello was a shift lieutenant and Rowell was the sergeant on Maciariello's shift.

The events leading to their demotions began in May 1987. On or about May 1, 1987, Rowell arrested a Shawn Scott for driving under the influence. Pursuant to department policy Scott took a breathalyzer test and was videotaped. (J.A. 247:4-24). Several weeks later, at the request of Susan Howle (Scott's sister and Rowell's co-worker), Rowell decided to *nol pros* Scott's case. (J.A. 250:15 – 253:17). Around this time Rowell learned that the Scott videotape was defective in that it contained no picture, just audio. (J.A. 257:6 – 259:21). Rowell theorized that

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[1] References to the Joint Appendix below are noted "J.A. page:line(s)."

Captain Robert Broach, the department's patrol commander and third in command, tampered with the Scott video. The basis for Rowell's assumption was his unsubstantiated belief that Broach was infatuated with Howle (J.A. 275:10-23) and that Broach altered the videotape in the hopes of assisting Scott in getting the charges dropped, thus endearing himself to Howle. (J.A. 92:8-20).

Instead of reporting their suspicions to internal affairs, the Assistant Chief of Police, the Chief of Police, or anyone else in authority, Maciariello and Rowell decided to conduct an "investigation." It was not until mid-August that the department learned that Maciariello and Rowell were "investigating" Robert Broach for alleged evidence tampering.

On or about August 16, 1987, Assistant Chief Harris overheard someone talking about the secret investigation. (J.A. 67; 82:25 – 83:3). He called Maciariello and Rowell into his office and asked them to explain to him what they were doing. Harris reported this meeting to Chief Sumner, who then concluded that the department should conduct an internal investigation into the suspected evidence tampering. (J.A. 36:8-17). Sumner appointed Lt. Balkcum of the detective division to complete the internal review.[2]

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[2] Captain Bailey, head of the detective division, could not conduct the investigation because of a conflict of interest. (J.A. 57-58). Bailey was in charge of the evidence room and stated that he had given Broach the Scott videotape to review. However, Broach denied viewing the tape and the chain of custody card did not show that Broach had checked out the tape. (J.A. 79:20-23).

Balkcum took statements from all City employees involved in any way with the Shawn Scott case. As part of the investigation Captain Broach took a polygraph examination at the South Carolina Law Enforcement Division (SLED). Balkcum reported that the polygraph results were conclusive that Broach was telling the truth when he stated that he did not tamper with the Scott video. Balkcum's final report (J.A. 30-35) cleared Broach of any wrongdoing.

Sumner was disturbed that two of his officers had conducted an investigation of a superior officer for evidence tampering without reporting their suspicions to anyone in authority. It was his belief that if Broach, who was then the patrol commander and third in command in the police department, had tampered with evidence then the Chief needed to know. (J.A. 412:8-13). For two months Maciariello and Rowell conducted an investigation of a superior officer, their patrol commander. As part of their unauthorized investigation they surreptitiously tape recorded a conversation with a municipal judge. (J.A. 264:22 – 265:21). It was not until Harris, the Assistant Chief, overheard someone talking about the "investigation" and confronted Maciariello and Rowell that they came forward with their suspicions.[3]

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[3] In their petition, petitioners assert, incorrectly, that they reported their suspicions to Captain Bailey. (Petition at p. 14). However, Captain Bailey's affidavit (Petitioners' Appendix 30a – 32a) specifically states that he first spoke to Maciariello and Rowell about their investigation in September, one month *after* Chief Sumner and Assistant Chief Harris learned of the secret investigation.

Sumner decided that Maciariello and Rowell should be demoted for their failure to report the alleged evidence tampering to him and for conducting an unauthorized investigation. He met personally with each one on Monday, October 5, 1987, to give them his decision. (J.A. 36; 37; 395:14-18).

Immediately upon learning of their demotions Maciariello and Rowell went to see Paul Paskoff, the City Administrator. After talking with Paskoff for approximately forty-five minutes, Maciariello and Rowell placed their badges on his desk and told him that they did not need their jobs with the City. Both admitted that it was their intention to resign and not return to work for the City when they placed their badges on Paskoff's desk. (J.A. 105:25 – 106:6; 287:3 – 288:7).

According to City policy, however, in order to resign in good standing an employee must resign to his department head and give two weeks notice. (J.A. 432:6-18). On Thursday, October 8, 1987, after Maciariello and Rowell failed to report to work, Sumner notified them that they were no longer employed with the City. (J.A. 38; 39).

Despite their resignations, Maciariello and Rowell filed grievances over their demotions. (J.A. 40-41; 42). Sumner responded. (J.A. 43; 44). The grievance committee recommended that the demotions be reversed. (J.A. 47; 48). City Council decided to reject the grievance committee's recommendation and accepted Paskoff's recommendation that the demotions be upheld.[4] Maciariello and

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[4] The City of Lancaster is governed by a Council form of government pursuant to South Carolina Code of Laws § 5-1-10,

Rowell were notified by letter that City Council denied their grievances concerning their demotions. (J.A. 52; 53).

Proceedings in the District Court and Fourth Circuit

Maciariello and Rowell filed suit in March 1990 alleging three causes of action: 1) violations of their First and Fourteenth Amendment rights to freedom of speech; 2) outrageous conduct; and 3) violation of the public policy of the State of South Carolina.

The defendants – Chief Sumner (Sumner), City Administrator Paskoff (Paskoff), the City of Lancaster (City), and the Lancaster Police Department (Department) – answered the complaint on April 18, 1990. On December 19, 1990, they filed a motion for summary judgment as to all three causes of action. By Order entered January 31, 1991, the court granted the motion as to the claim for outrageous conduct and denied the motion as to the remaining claims.

On July 24, 1991, in response to recent legal developments, the defendants renewed their motion for summary judgment as to the remaining causes of action. Maciariello and Rowell responded and filed a cross-motion for summary judgment on August 12, 1991. In an Order entered on October 7, 1991, the court denied both parties' motions for summary judgment as to the First Amendment claim. The court also ruled that Sumner and Paskoff

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et seq. South Carolina Code of Laws § 8-17-140 provides that final determination for grievance matters rests with the governing body, in this case, City Council.

were not entitled to the defense of qualified immunity on the First Amendment claim.

Sumner and Paskoff appealed the qualified immunity issue by filing a Notice of Appeal on October 17, 1991. Sumner, Paskoff, the City, and the Department filed a Motion to Amend Interlocutory Order on October 17, 1991, pursuant to 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5(a). By Order entered on November 25, 1991, the district court amended its Order and certified the free speech issue to the Fourth Circuit. The defendants filed a Petition to Appeal Interlocutory Order on November 25, 1991, and the Fourth Circuit granted the Petition on December 31, 1991.

The court of appeals held that Maciariello and Rowell's secret and unauthorized investigation *per se* was not speech. The court recognized, however, that certain components of the employees' investigation were speech, specifically, their conversations with each other and with City Judge Sowell. The court proceeded to determine whether the speech components of the employees' investigation was the "but for" cause of their demotions and concluded that they were not. The unanimous panel further reasoned that *even if* the investigation were speech and *even if* the investigation were the "but for" cause of the demotions, Maciariello and Rowell's First Amendment rights were nevertheless not violated because their interest in this speech was outweighed by the defendants' interest in promoting efficiency, discipline and integrity within the police department.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision that the petitioners' actions in conducting an unauthorized and secret investigation of a superior officer and their failure to report their suspicions is not protected speech, is a narrow holding which is limited to the facts in this case.

Furthermore, despite petitioners' argument to the contrary, there is no conflict among the circuits on the points of law raised by petitioners. The Eighth Circuit decision cited by petitioners is easily distinguished from the instant case and, in any event, the final conclusion of the two circuits is identical.

The Fourth Circuit did not misapply the *Mt. Healthy* balancing test in requiring the petitioners to show that "but for" their protected activity they would not have been demoted. The "but for" standard is not a higher standard, as petitioners contend, and this Court has previously held that the standard enunciated in *Mt. Healthy* is "but for."

Finally, petitioners failed to respond to the Fourth Circuit's ultimate conclusion that even if petitioners' investigation were "speech," and even if this "speech" were the "but for" reason for their demotions, the interests of the Police Department outweighed the interests of the petitioners.

The Fourth Circuit's analysis and ultimate conclusion accords with both its own precedent and this Court's precedent. The petition for writ of certiorari should, therefore, be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT A SECRET AND UNAUTHORIZED INVESTIGATION OF A POLICE OFFICER BY SUBORDINATES IS NOT, IN AND OF ITSELF, SPEECH UNDER THE FIRST AMENDMENT.

As petitioners concede, no court has ever held that an unauthorized and secret investigation of one police officer within a department by a subordinate police officer within that same department in and of itself constitutes speech under the First Amendment. The Fourth Circuit did not, as petitioners argue, hold that petitioners' unauthorized investigation of their patrol commander was not speech because the speech was privately communicated. The court held that the investigation itself was not speech because it

> . . . did not express, and was not intended to express, anything to anyone; its central feature was secrecy. Rowell and Maciariello deliberately chose *not* to speak, and they hid their activities so that those activities *would not* convey a message. Though they claim that they intended to speak out eventually, their intention expresses nothing.

973 F.2d at 299. (emphasis in original).

The Fourth Circuit's holding that the investigation itself was not "speech" is supported not only by logic but also by the decisions of other courts of appeal. *Dennison v. County of Frederick, Va.*, 921 F.2d 50 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2828 (1991); *Terrell v. University of Texas System Police*, 702 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987); *Guillory v. St. Landry Parish Police Jury*,

802 F.2d 822 (5th Cir. 1986), *cert. denied,* 482 U.S. 916 (1986). The Fourth Circuit's holding is not in conflict with any of this Court's decisions, and petitioners' rhetorical excesses do not change that fact.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IN *HUGHES V. WHITMER.*

Petitioners argue that this Court should grant certiorari because the Fourth Circuit's decision is in conflict with the Eighth Circuit's decision in *Hughes v. Whitmer,* 714 F.2d 1407 (1983), *cert. denied,* 465 U.S. 1023 (1984). They are wrong. There is no conflict between the two decisions.[5] In suggesting otherwise, petitioners simply have conveniently overlooked a critical factual distinction.

In *Hughes,* the plaintiff state trooper alleged that he had been transferred in retaliation for, *inter alia,* accusing a fellow trooper's son of drug trafficking and in retaliation for conducting an investigation into the son's alleged drug trafficking. Hughes told his troop commander of his suspicions and secured the troop commander's authorization to conduct the investigation of his colleague's son. 714 F.2d at 1411. It was in this factual context that the Eighth Circuit referred to Hughes's "accusations and investigations" as "speech-related." *Id.* at 1421.

Unlike Hughes, petitioners investigated their commander, not his child. Moreover, petitioners did not report their suspicions about their commander to the

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[5] The Fourth Circuit was aware of *Hughes* and in fact, cites *Hughes* in part v of the opinion. 973 F.2d at 300.

chief, assistant chief, city administrator or anyone else in authority. Unlike Hughes, they did not seek or obtain permission from anyone in authority to investigate Captain Broach. Indeed, if Assistant Chief Harris had not overheard a conversation and confronted petitioners two months *after* they began their rogue investigation, their investigation and the possible evidence tampering by their superior might not ever have come to light.

Thus, petitioners' assertion that the Fourth Circuit's decision conflicts with the Eighth Circuit's decision in *Hughes* does not withstand scrutiny. *Hughes* does not stand for the proposition that a police officer's unauthorized and clandestine investigation of a superior officer constitutes protected speech. Not surprisingly, petitioners have cited no case that does stand for such a proposition.

III. THE COURT OF APPEALS DID NOT MISAPPLY THE CAUSATION STANDARD SET FORTH IN *MOUNT HEALTHY CITY SCHOOL DISTRICT BD. OF EDUC. V. DOYLE.*

Petitioners fault the Fourth Circuit for misapplying the causation standard enunciated in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). The court of appeals, after acknowledging that petitioners' speech to City Judge Sowell and each other during the course of their unauthorized investigation of Captain Broach constituted "speech," declared that under *Mt. Healthy*, "the protected speech must have been a 'but for' cause of the discharge or demotion." 973 F.2d at 299. Petitioners argue that *Mt. Healthy* does not require a showing of "but for" causation. They argue that "a

motivating factor" – the term used in *Mt. Healthy* – is something less than "but for."

Petitioners are simply wrong. This Court held in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), that the ultimate inquiry is indeed whether "*but for*" a public employee's protected speech, the employee would have been retained. 439 U.S. at 417. (emphasis original). As the Court explained in *Givhan*, any lesser standard "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." 439 U.S. at 416, quoting *Mt. Healthy*, 429 U.S. at 285.

Thus, the Fourth Circuit's statement of the causation standard in "but for" terms does not conflict with *Mt. Healthy*. Indeed, the Fourth Circuit has consistently couched the causation requirement in First Amendment cases in "but for" terms. *See Huang v. Bd. of Governors of the Univ. of North Carolina*, 902 F.2d 1134, 1140 (4th Cir. 1990); *Daniels v. Quinn*, 801 F.2d 687, 689 (4th Cir. 1986); *Johnson v. Town of Elizabethtown*, 800 F.2d 404, 406 (4th Cir. 1986); *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 878 (4th Cir. 1984).

IV. PETITIONERS DO NOT RESPOND TO THE HOLDING OF THE COURT OF APPEALS THAT RESPONDENTS' INTEREST IN MAINTAINING DISCIPLINE, INTEGRITY AND EFFICIENCY OUTWEIGHED PETITIONERS' INTEREST IN CONDUCTING AN UNAUTHORIZED AND SECRET INVESTIGATION, AND SUCH HOLDING IS AN INDEPENDENT BASIS FOR SUPPORTING THE FOURTH CIRCUIT'S DECISION.

Petitioners fail to point out that the court of appeals assumed for the sake of argument that petitioners' investigation and conversation with each other was "speech" and that this speech was the effective cause of their demotions. Nevertheless, the court held, the speech was not protected because petitioners' interest in this speech was outweighed by the respondents' interest in maintaining efficiency, integrity and discipline within the police department. 973 F.2d at 300. Petitioners do not seek review of this determination which provides an independent basis supporting the judgment of the court of appeals.

The court of appeals correctly noted that personal animosity motivated petitioners to undertake their unauthorized investigation of Captain Broach and that this motivation detracts from their claim that their speech related to a matter of public concern. 930 F.2d at 300, *citing McMurphy v. Flushing*, 802 F.2d 191, 197-98 (6th Cir. 1986); *accord, Breuer v. Hart*, 909 F.2d 1035, 1038-39 (7th Cir. 1990); *Joyner v. Lancaster*, 815 F.2d 20, 23-24 (4th Cir. 1987), *cert. denied*, 484 U.S. 830 (1987). The court further noted that a public employer's interest in maintaining efficiency, integrity and discipline within its police

department requires that a police officer's First Amendment rights be correspondingly restricted. 973 F.2d at 300, *citing Jurgensen v. Fairfax County*, 745 F.2d 868, 880 (4th Cir. 1984); *Hughes v. Whitmer*, 714 F.2d 1407, 1418 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); and *Kelly v. Johnson*, 425 U.S. 238 (1976). The court of appeals properly concluded that the respondents' interest in maintaining efficiency, discipline and integrity within the police department outweighed petitioners' interest in secretly speaking about and investigating Captain Broach.

To determine whether speech on a matter of public concern is protected such that a public employee cannot be disciplined for the speech, a court must balance the employee's interest in speaking as he did against the employer's interest in maintaining and promoting integrity, discipline and efficiency. *Connick v. Meyers*, 461 U.S. 138, 150-151 (1983). When close working relationships are required between subordinates and superiors, an employer's judgment that the speech at issue would disrupt those close working relationships and impede discipline and efficiency is entitled to "a wide degree of deference." *Id.* at 151-152.

Police departments, preeminently among government offices, require close working relationships between superior and subordinate. *Breuer v. Hart*, 909 F.2d 1035, 1041 (7th Cir. 1990); *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989); *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987); *Hughes v. Whitmer*, 714 F.2d 1407, 1419-20 (8th Cir. 1983). That an unauthorized secret investigation of a superior by a subordinate police officer has the potential

for serious disruption of the integrity, efficiency and discipline of a small municipal police department is obvious. As the Fourth Circuit observed:

> A police department has an undeniable interest in discouraging unofficial internal investigations. If personal investigations were the usual way for an officer to check out suspicious activities of a fellow officer, the effect on efficiency and morale could be very disrupting and the effectiveness of the police force might deteriorate. Instead of concentrating on their traditional duties in the community, officers with personal hostilities could become preoccupied with personal investigations of one another. Esprit de corps could collapse into a kafkaesque nightmare of improper investigations into the impropriety of improper investigations.

973 F.2d at 300.

The Fourth Circuit correctly weighed the competing interests of petitioners and respondents and found that the respondents' interest in discipline, integrity and efficiency within the ranks of the police department outweighed petitioners' interest in conducting an unauthorized secret investigation of their patrol commander. As the court noted, *Connick* does not require a showing of actual destruction of close working relationships or actual disruption of discipline and efficiency. 461 U.S. at 152. That such destruction and disruption are reasonably to be apprehended as a result of petitioners' actions is apparent.

Accordingly, for the reasons given by the court of appeals, petitioners' First Amendment claim fails even if their secret investigation of their patrol commander were

protected speech and the "but for" cause of their demotions.

CONCLUSION

Rule 10 of the Rules of the Supreme Court states in pertinent part, "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." There are no special and important reasons for reviewing the Fourth Circuit's disposition in this case. Although petitioners argue that the unanimous opinion of the panel was fundamentally flawed, their failure to petition for rehearing or rehearing *en banc* belies their argument. The petition should be dismissed.

Respectfully submitted,

STEPHEN T. SAVITZ
VANCE J. BETTIS
LINDA PEARCE EDWARDS
GIGNILLIAT, SAVITZ & BETTIS
1527 Blanding Street
Columbia, South Carolina 29201
Telephone: (803) 799-9311

Attorneys For Respondents

Columbia, South Carolina

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